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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 108

CENTAUR CONSTRUCTION COMPANY, INC.,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 26-32) is reported at 107 C. Cls. 498.

JURISDICTION

The judgment of the Court of Claims was entered on January 6, 1947 (R. 32). A motion for a new trial was filed on February 6, 1947 (R. 32), and overruled on March 3, 1947 (R. 32). The petition for a writ of certiorari was filed on June 2, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether Title II of the First War Powers Act of December 18, 1941, authorizing the amendment or modification of "contracts heretofore or hereafter made * * * without regard to the provisions of law relating to the * * * amendment, or modification of contracts," authorized the amendment, in October 1942, of a Navy Department contract which had been entered into in November 1939, completed by the contractor in October 1940, and upon which final payment had been made by the Government in June 1941.

STATUTE AND EXECUTIVE ORDER INVOLVED

Title II of the First War Powers Act, 1941 (Act of December 18, 1941, c. 593, 55 Stat. 838, 839, Title II, Sec. 201, 50 U. S. C. App., Supp. V, 611), and Executive Order No. 9001, dated December 27, 1941, are set forth in the Appendix, pp. 14-21.

STATEMENT

On November 20, 1939, petitioner entered into a contract with the Navy Department for certain construction work to be performed at the Brooklyn Navy Yard (R. 17). Petitioner commenced work on December 26, 1939, and shortly discovered that the site conditions differed materially from those thought to exist at the time of the agreement, necessitating changes in the pile layout and a revised sewer design (R. 18). Peti-

tioner submitted, on request, estimates of increased costs of \$87,450 due to the pile layout change,' and on January 26, 1940 it was authorized to proceed with both changes, subject to formal determination of the resulting modifications in contract price and performance period in accordance with the contract procedure (R. 18). Pursuant to this procedure, an official Board on Changes (consisting of one representative of the contractor and two of the Navy) was appointed to consider necessary contract changes on account of these and other change orders. The Board recommended various increases in the contract price and extensions of contract time; in the case of the redesign of the sewer, the contract price was decreased and petitioner's claim for engineering service for redesigning the sewer was disallowed (R. 20-23). The contracting officer accepted the Board's recommendations in major part, but reduced the recommended increases by a total of \$5,565.69 (R. 20-22); extensions of time for completion of the stages of the work, and of the entire work, were also granted (R. 23).

Petitioner delayed performance sixteen days beyond the extended completion date for construction of the sewer, forty-eight days beyond the extended date for completion of another por-

¹ Apparently, it was contemplated that the changed sewer design would cost less than the original design (R. 18).

tion of the work, and four days beyond the new date set for full performance, October 21, 1940 (R. 23). Under the terms of the contract, liquidated damages were assessable for such delays, and the contracting officer computed these liquidated damages at \$5,080 (R. 23). Petitioner took no appeals under article 15 of the contract (R. 12, 19) from the contracting officer's decisions assessing liquidated damages or establishing new prices or contract terms on account of the contract changes (R. 24).

On June 9, 1941, petitioner was issued a final voucher in full payment of the contract price as determined by the contracting officer, less \$5,080 deducted as assessed liquidated damages, and received payment accordingly (R. 23). At the same time, petitioner acknowledged receipt of the sum paid and released the Government from all claims arising under or by virtue of the contract "except that the contractor reserves the right to make claim for, sue for, and endeavor to collect the following amounts": (a) the amount of assessed liquidated damages (\$5,080); (b) the sum originally claimed, but disallowed, for engineering services for redesigning the sewer (\$3,600); and (c) the sum of \$5,565.69 which the contracting officer had deducted from the price increases recommended by the Board on Changes (R. 23-24). No further action was taken at that time by petitioner to collect these excepted amounts.

Six months thereafter, on December 18, 1941, the First War Powers Act was enacted; and some seven months after the passage of that Act, on August 13, 1942, petitioner wrote the Navy Department requesting a review of the reserved items, under the First War Powers Act and Executive Order No. 9001, which had been issued pursuant to the Act on December 27, 1941 (R. 24). This was over fourteen months after receipt of the final voucher. Such review was apparently had, and on October 22, 1942, the Assistant to the Chief of the Bureau of Yards and Docks wrote petitioner that under authority of the First War Powers Act, 1941, and Executive Order No. 9001, the Navy Department would remit the liquidated damages and also allow the sum of \$4,581.59 on the third excepted item of \$5,565.69, on the ground that the remission and allowance "will facilitate the prosecution of the war in that it will enable you the better to carry on the war work on which you are now engaged" (R. 4, 25).

A voucher in the sum of \$9,661.59 and a release to effectuate the remission and allowance were prepared and forwarded to the General Accounting Office for approval and settlement, but the Comptroller General refused to authorize payment. By letters of January 28, 1944, and of May 12, 1944, he advised petitioner that, since the contract work was completed and payment made before enactment of the First War Powers Act,

the Navy Department's attempted amendment of October 22, 1942, was invalid and of no effect (R. 25).

The present suit was instituted on October 18, 1944, to recover the sum (\$9,661.59) which the Comptroller General had disallowed (R. 1, 5). The Court of Claims dismissed the claim, in so far as it was based on the First War Powers Act, for substantially the same reason as the Comptroller General (R. 30-31). The court also held that, aside from the War Powers Act, the Navy Department had no authority under the original contract to review petitioner's claims some sixteen months after "the issuance of the final voucher and after the work had been finished and accepted" (R. 29).

ARGUMENT

Petitioner has abandoned its claim that the contract modification of October 1942 was properly made under the terms of the original contract, and it now rests squarely on the power with which the Navy Department has been endowed by Title II of the First War Powers Act, 1941, and Executive Order No. 9001. But the Court of Claims was correct in holding that neither of these sources of procurement power authorized the Navy Department to amend or modify pre-war agreements which had been fully performed by the contractor, and upon which final payment

had been made by the Government six months before the passage of the Act.

1. In the First War Powers Act Congress empowered the President to authorize governmental agencies "exercising functions in connection with the prosecution of the war effort" to enter into "contracts" and to amend or modify "contracts heretofore or hereafter made," regardless of the "provisions of law relating to the making, performance, amendment, or modification of contracts," whenever the President deemed such action "would facilitate the prosecution of the war." Title II, Section 201, *infra*, p. 14. It may be assumed, as the Court of Claims did, that by Executive Order No. 9001 the President authorized the Navy Department to exercise the full breadth of this statutory power.² But by the specific provisions of the statute the Department's authority was necessarily limited to the amendment or modification of "*contracts*," the legal term which aptly describes an executory, undischarged, uncompleted agreement, as distinguished from a completed consensual arrange-

² General discussion of the use of the Act for modification of war contracts is contained in Rowley, *The First War Powers Act Cases*, appearing in Shepherd, *Cases and Materials on the Law of Contracts* (2nd ed., 1946), pp. 1233-1238; Kramer, *Extraordinary Relief for War Contractors* (1945) 93 U. of Pa. L. Rev. 357; and Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944) 44 Col. L. Rev. 127, 194 *et seq.*

ment. "If a transaction is fully executed on both sides, it is not properly described as a contract * * *. All contracts to a greater or less extent are executory. When they cease to be so, they cease to be contracts." Williston, *Contracts* (Rev. Ed.), Sec. 14, pp. 21-22.² After full performance there would no longer exist a contract which the parties could amend or modify; the War Powers Act and Executive Order authorized a department to amend contracts, and not to change completed transactions which had resulted from once executory, but now non-existent, contracts. This normal reading of the statutory language, in the light of general contract law and usage, fully accords with the primary purpose of Title II "to speed up the procurement of war matériel" by eliminating unnecessary peacetime restrictions in order to "give the procurement agencies the flexibility they need in the procurement" of war supplies (H. Rep. No. 1507, S. Rep. No. 911, 77th Cong., 1st sess.), and allows full scope to the modification of existing defense and war agreements "so as to meet the countless dislocations and uncertainties caused by changes in weapons, in strategy, in the economy, in the availability of commodities, and other variables." 40 Op. Atty. Gen. No. 53,

² Williston also points out the ambiguity and inaccuracy latent in the terms "executory contract" and "executed contract" and asserts that they should not be used. Section 14, p. 22.

August 29, 1942, at p. 9. At the same time, this interpretation bars stale claims of perhaps indefinite duration, and establishes a precise and convenient boundary mark for the retrospective reach of administrative authority under the Act. Petitioner's construction, on the other hand, would impose no chronological limit on the resuscitation and amendment of fully executed agreements.⁴

Like the Court of Claims in the instant case, the Attorney General early construed the Act to authorize the revision and modification of "existing arrangements" (40 Op. Atty. Gen. No. 53, August 29, 1942, at p. 9).⁵ The Comptroller General has consistently held to the same effect, 24 Comp. Gen. 723, 726; B-43827, November 9, 1944 (unreported); B-40591, May 12, 1944, Exhibit S, R. 25 (not printed); cf. 25 Comp. Gen. 332, 336. The Under Secretary of War, who has general supervision of War Department procurement (Army Regulations 5-5; War Department Pro-

⁴ Thus, under petitioner's construction, contracts completed in World War I would be amended or modified, if in the opinion of the appropriate officials, the prosecution of World War II would be facilitated.

⁵ The Attorney General's opinion states:

"In passing the First War Powers Act, the Congress desired to enable you [the Secretary of War], and the contractors who supply you with war matériel, to revise and modify *existing arrangements* so as to meet the countless dislocations and uncertainties caused by changes in weapons, in strategy, in the economy, in the availability of commodities, and other variables." [Italics supplied.]

curement Regulations, par. 107, 10 CFR, Cum. Supp. 81.107) qualified his delegation of authority to subordinate officials to amend contracts under the Act in the absence of consideration by the proviso that "in each instance * * * full performance by the contractor under such contract, or under a series of contracts between the United States and the same contractor for substantially the same goods, shall not have been completed and final payment made thereunder." War Department Procurement Regulations, par. 107 (e) (i) and (g), 10 CFR, Cum. Supp. 81.107 (e) (i) and (g).⁶ Many requested modifications were refused by subordinate officers for this reason. While the Under Secretary never formally disavowed his own authority to grant relief after full performance and final payment, less than a

⁶ As a matter of administrative policy, the War Department prohibited the chiefs of the technical and supply services (*e. g.*, Army Air Forces, Ordnance Department, Corps of Engineers) and their subordinates, from granting such relief after final administrative determination of the final amount due the contractor (even if payment had not been made), or where the proposed modification directly affected a matter pending before the General Accounting Office. War Department Procurement Regulations, par. 308f, 308g, 10 CFR, Cum. Supp. 81.308f, 81.308g. Where final payment had not been made, the intermediate higher authorities (*i. e.* the Director, Purchases Division, Army Service Forces and the Commanding General, Army Service Forces) were held to be empowered to make contract modifications in these circumstances) see opinion of the Judge Advocate General, SPJGC 1943/10938, 24 August 1943, digested in (1943) 2 Bull. J. A. G. 363, Sec. 2256), but such relief was not commonly given.

handful of such cases were referred to him, and so far as appears from available records no more than one or two, if any, may have been allowed. In the Navy Department, lower echelons were not authorized to agree to amendments after full performance by the contractor, and those requests for relief were handled by the central Office of Procurement and Material. Navy Procurement Directives, pars. 11,442, 11,443. It is probable that few, if any, amendments were made by the Navy Department after final payment, other than in the instant early case.⁷

2. There is no doubt, and petitioner does not claim otherwise, that before the passage of the First War Powers Act, and, of course, prior to the Navy Department's letters of October 22, 1942 (R. 24-25), the work under the original contract had been fully performed and final payment had been received. The contract was entered into on November 20, 1939 (R. 17) and all construction was completed on October 25, 1940 (R. 23). On June 9, 1941, six months before

⁷ In his unreported letter of November 9, 1944, B-43827, the Comptroller General wrote:

"That the First War Powers Act and Executive Order No. 9001 may not be invoked as authority for the amendment or modification of completed contracts appears to be well recognized by the War and Navy Departments, as well as the Attorney General."

A similar statement appears in the Comptroller General's letter of May 12, 1944 to petitioner. B-40591, Exhibit S (not printed).

the Act became law and over a year before petitioner's request for relief, the final voucher on the contract was issued, and payment was duly made (R. 23-24). Petitioner's formal reservation in its release of a right "to make claim for, sue for, and endeavor to collect" the three expected items (R. 23-24) did not serve to keep the contract alive indefinitely. A final administrative determination had been made in June 1941 that these sums were not owing on the contract, and the Court of Claims, in a holding which petitioner does not contest here, has now authoritatively held that at least by the time the Navy Department sought to invoke the War Powers Act in October 1942 petitioner, by its failure to exhaust its administrative remedies (cf. *United States v. Holpuch Co.*, 328 U. S. 234, 240), was barred from claiming a breach by the Government (R. 28-29). Thus both parties had fully performed all their contractual obligations, and their contract was at an end before the attempted modification was made.⁸

⁸ The palpably erroneous major premise of the petition (Pet. 2, 4, 5-7) is that the lower court improperly reviewed administrative action by the President and the Navy Department. But it is unmistakable from the Court of Claims' opinion and findings that it did not in the least seek to trench on administrative determinations that the action taken here "would facilitate the prosecution of the war;" the court merely held that Congress had not authorized the President, or his delegates, to deal under the First War Powers Act with completed prewar agreements (R. 30-31).

3. Because of the very restrictive practice of the War and Navy Departments, the main repositories of power under the First War Powers Act, with respect to modifications of fully performed contracts (*supra*, pp. 10-11), and in view of the well-known views of the General Accounting Office (*supra*, p. 9), it is highly unlikely that there exist more than the barest number, if any, of such modifications which are now open to contest.

CONCLUSION

The decision below is correct, there is no conflict, and the present situation is unlikely to arise again. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General,
PEYTON FORD,
Assistant Attorney General,
PAUL A. SWEENEY,
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Attorneys.

JULY 1947.

APPENDIX

1. Title II of the First War Powers Act, 1941 (Act of December 18, 1941, ch. 593, Title II, Sec. 201, 55 Stat. 838, 839, 50 U. S. C. App., Supp. V, 611) provides as follows:

The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided*, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further*, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further*, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

2. Executive Order No. 9001, December 27, 1941, 3 CFR, 1941 Supp., pp. 330-332, provides as follows:

AUTHORIZING THE WAR DEPARTMENT, THE
NAVY DEPARTMENT, AND THE UNITED STATES
MARITIME COMMISSION TO PERFORM THE
FUNCTIONS AND EXERCISE THE POWERS DE-
SCRIBED IN TITLE II OF AN ACT APPROVED
DECEMBER 18, 1941, ENTITLED "AN ACT TO
EXPEDITE THE PROSECUTION OF THE WAR
EFFORT", AND PRESCRIBING REGULATIONS FOR
THE EXERCISE OF SUCH FUNCTIONS AND
POWERS

The successful prosecution of the war requires an all-out industrial mobilization of the United States in order that the materials necessary to win the war may be produced in the shortest possible time. To accomplish this objective it is necessary that the Departments of War and the Navy and the United States Maritime Commission cooperate to the fullest possible degree with the Office of Production Management in the endeavor to make available for the production of war material all the industrial resources of the Country. It is expected that in the exercise of the powers hereinafter granted, these Agencies and the Office of Production Management will work together to bring about the conversion of manufacturing industries to war production, including the surveying of the war potential of industries, plant by plant; the spreading of war orders; the conversion of facilities; the assurance of efficient and speedy production; the development and use of subcontracting to the fullest extent and the conservation of strategic materials.

TITLE I

1. By virtue of the authority in me vested by the Act of Congress, entitled "An Act

to expedite the prosecution of the War effort", approved December 18, 1941 (hereinafter called "the Act") and as President of the United States and Commander-In-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.

2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent,

purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

3. The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and ir-

respective of rights which may have accrued under the contract, or the amendments or modifications thereof.

4. Advertising, competitive bidding, and bid, payment, performance or other bonds or other forms of security, need not be required.

TITLE II

Pursuant to Title II of the Act and for the protection of the interests of the United States, I do hereby prescribe the following regulations for the exercise of the authority herein conferred upon the War Department, the Navy Department, and the United States Maritime Commission.

1. All contracts and all purchases made pursuant to the Act and this Executive Order shall be reported to the President of the United States. Such reports shall be made at least quarter-annually, provided, however, that purchases or contracts of less than \$100,000 may be consolidated in such reports with other such purchases and need not be separately set forth. In case the War Department, the Navy Department, or the United States Maritime Commission shall deem any purchase or contract to be restricted, confidential, or secret in its nature by reason of its subject matter, or for other reasons affecting the public interest, such purchases or contracts shall not be included with those described in the report just mentioned, but shall be included in a separate report containing such restricted, confidential, or secret purchases or contracts. The Secretary of War, the Secretary of the Navy, and the United States Maritime Commission shall make public so much of such reports (other

than those reports covering restricted, confidential, or secret contracts or purchases) as they shall respectively deem to be compatible with the public interest.

2. Notwithstanding anything in the Act or this Executive Order the War Department, the Navy Department, and the United States Maritime Commission shall not discriminate in any act performed thereunder against any person on the ground of race, creed, color or national origin, and all contracts shall be deemed to incorporate by reference a provision that the contractor and any subcontractors thereunder shall not so discriminate.

3. No claim against the United States arising under any purchase or contract made under the authority of the Act shall be assigned except in accordance with the Assignment of Claims Act, 1940 (Public No. 811, 76th Congress, approved October 9, 1940).

4. Advance payments shall be made hereunder only after careful scrutiny to determine that such payments will promote the national interest and under such regulations to that end as the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may prescribe.

5. Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

"The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the

contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

6. Nothing herein shall be construed to authorize the cost-plus-a-percentage-of-cost system of contracting.

7. Nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits, or the payment of a fee in excess of such limitation as may be specifically set forth in the act appropriating the funds obligated by a contract. In the absence of such limitation, the fixed fee to be paid the Contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this Order shall not exceed seven per centum of the estimated cost of the contract (exclusive of the fee as determined by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission, as the case may be).

8. No contract or modification or amendment thereof shall be exempt from the provisions of the Walsh-Healey Act (49 Stat. 2036) because of being entered into without advertising or competitive bidding, and the provisions of such act, the Davis-Bacon Act, as amended (49 Stat. 1011), the Copeland Act, as amended (48 Stat. 948), and the Eight Hour Law, as amended by the Act of September 9, 1940 (Public No. 781, 76th Congress) if other-

wise applicable shall apply to contracts made and performed under the authority of this Order.

FRANKLIN D ROOSEVELT.

THE WHITE HOUSE, *December 27, 1941.*